No. 87-919

Supreme Court, U.S.
FILED
DEC 23 1987
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

THE TIMES MIRROR COMPANY,
TRIBUNE NEWSPAPERS WEST, INC.,
and LOZANO ENTERPRISES,

Appellants,

v.

THE CITY OF LOS ANGELES,

Appellee.

On Appeal from the California Court of Appeal, Second Appellate District, Division Two

REPLY MEMORANDUM

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EDITOR'S NOTE

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REPLY MEMORANDUM

Appellee's Motion provides no basis whatsoever for dismissing this appeal or for affirming the Court of Appeal's ruling below. As the following discussion will show, the arguments presented by appellee with respect to the first and third questions presented to this Court in appellants' Jurisdictional Statement are wholly without merit. In addition, the appellee's Motion does not even address the second question presented to this Court by appellants, which concerns this Court's application of *Buckley v. Valeo*, 424 U.S. 1 (1976), to a state's taxing power. Therefore, ap-

pellee implicitly has conceded that this question is substantial and therefore warrants review by this Court.

I.

APPELLANTS' FIRST QUESTION, CONCERNING DISCRIMINATORY TAX BURDENS ON THE MEDIA, IS SUBSTANTIAL AND MERITS REVIEW BY THIS COURT

The justifications for this Court's review of the appellee's tax scheme, which imposes discriminatory tax burdens on different media, are fully set forth in the Jurisdictional Statement and will not be repeated here. However, several assertions made by appellee in its Motion demand a response.

First, appellee asserts that appellants are not subjected to discriminatory taxation because they are included in a "generic" classification with other businesses engaging in wholesale or retail sales. Motion, at 3-5. This assertion completely misses the point of appellants' argument. What appellee carefully ignores is its differential tax treatment of different media. Under the challenged tax scheme, newspapers are treated differently, for example, from billboard companies and motion picture producers in the absence of any justification, compelling or otherwise, for such differentiation.

Such differential taxation must be subjected to the same exacting constitutional scrutiny as was the differential taxation present in *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575 (1983). The harms that this Court sought to avoid in *Minneapolis Star*—namely, the government's abil-

ity to use its taxing power to censor the press by differential taxation—are just as threatening under the facts of the instant case. Under appellee's submission, there would be no constitutional barrier to appellee's shifting members of the media to less favorable categories of taxation depending upon the content of their speech.

Furthermore, it is just as destructive of constitutional values to permit the government to tax favorably one group of media (namely, movie producers), at the expense of others, as it is to penalize one or a few members of the media by unfavorable taxation. *Minneapolis Star*, 460 U.S., at 589-90 ("the very selection of the press for special treatment threatens the press not only with the current differential treatment, but with the possibility of subsequent differentially more burdensome treatment"). Thus, the instant case presents the "flip side" of *Minneapolis Star*: there, the government singled out a few members of the media for harsh treatment; here, the government has singled out a few members of the media for overwhelmingly favorable treatment. As this Court has recognized, neither scheme is constitutionally permissible. *Id.*

Second, with regard to the differential taxation of movie producers, appellee responds by asserting that the movie industry is "fragmented," and that "all the fragments" are taxed. Motion, at 9. This argument is also unresponsive.

Appellee has never attempted, either before the courts below or before this Court, to offer even the slightest justification for the vastly disparate treatment given to movie producers under the challenged tax scheme. In addition, no justification has been

shown for the particular tax structure here that "caps" taxes paid by movie producers at $10,750, while the taxes paid by newspapers and all other media are unlimited. Similarly, no justification has been offered for the disparate treatment of other members of the media, such as billboard companies. Under this Court's holding in *Minneapolis Star*, it is appellee's burden to demonstrate a compelling justification for this differential taxation of the media. 460 U.S., at 585. Appellee has not even attempted to meet this burden.

Third, appellee characterizes appellants' argument as requiring that it impose a uniform tax on all businesses. This characterization is simply unfounded. It is true that where the media are involved, there is a presumption that all members of the media must be treated alike *unless* there is a showing that a compelling governmental interest justifies differential treatment. *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952). It is appellee's failure to offer any such justification that is the vice in the challenged tax scheme.

Finally, appellee attempts to argue that there are no inconsistent decisions among the state and federal courts on the questions presented by appellants. Motion, at 11-13. However, even a cursory reading of the cases cited in the Jurisdictional Statement, and the legal analysis each sets forth, establishes that a conflict of authority exists, not only among different states, but even among the Courts of Appeal of California and between the federal and state courts. For this reason alone there is a clear and immediate need for this Court to note probable jurisdiction over this case and to give plenary consideration to these issues.

II.

APPELLANTS' THIRD QUESTION, CONCERNING THE GRANTING OF STANDARDLESS DISCRETION TO A GOVERNMENT OFFICIAL TO APPORTION TAXES ON THE MEDIA, IS SUBSTANTIAL AND MERITS REVIEW BY THIS COURT

The third question presented to this Court, concerning the constitutionality of granting standardless discretion to a government official to apportion taxes on the media, is discussed at length in the Jurisdictional Statement and will not be repeated here. Once again, however, several unsupportable assertions made by appellee warrant a reply.

First, appellee claims that the exercise of standardless discretion is totally immune from constitutional scrutiny in the taxation context, purportedly because its taxation scheme is not "regulatory." Motion, at 13-14. This breathtaking assertion is meritless. No such constitutional distinction exists between the States' exercise of the regulatory and taxing powers, as was explained in the Jurisdictional Statement, at 15-16. Moreover, the challenged ordinance provides that all persons engaged in business must obtain a "business tax registration certificate," the issuance and retention of which is *expressly conditioned* upon paying the taxes assessed under the City business tax. L.A.M.C. §§ 21.03(a), 21.08. Thus, the discrimination practiced in appellee's tax scheme directly affects appellants' ability to obtain a business license.

Furthermore, the fact that appellee's Clerk has promulgated regulations that might, in some cases, apportion taxes in a constitutional manner is irrelevant to a consideration of the facial validity of the business

tax. By its own terms, the challenged Municipal Code permits the Clerk to modify the regulations at his whim, thereby affording the Clerk precisely the sort of standardless discretion which this Court has repeatedly struck down. J.S., App. E, 33a (permitting Clerk to promulgate whatever regulations "are necessary and desirable").

Finally, appellee's attempt to distinguish *Big Mama Rag v. United States*, 631 F.2d 1030 (D.C. Cir. 1980), is without merit. Notwithstanding appellee's assertions to the contrary, Motion, at 14-15, the regulations which were struck down in *Big Mama Rag* did not involve content-based discrimination. Rather, the regulations involved were so vague that they would have *permitted* the IRS to discriminate against certain individuals based upon their exercise of First Amendment rights. *Id.*, at 1040. It was the vagueness of those regulations that rendered them unconstitutional, not whether the regulations had actually been implemented by the IRS in a discriminatory fashion. Similarly, appellee's apportionment scheme is unconstitutional because of its vagueness.[1]

III.

CONCLUSION

Appellee has utterly failed to provide any justification for dismissal of appellants' appeal or for summary affirmance of the Court of Appeal's decision. Therefore, probable jurisdiction should be noted and

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[1] The City's reliance on *Regan v. Taxation with Representation*, 461 U.S. 540 (1983), is also unpersuasive given this Court's understanding of *Regan* set forth in *Arkansas Writers' Project v. Ragland*, No. 85-1370 (Apr. 22, 1987), 107 S. Ct. 1722 (1987).